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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. **[REDACTED]**

92

FLORENCE GUGGENHEIM

Petitioner

v.

**ALMON Q. RASQUIN, individually and as United States Collector
of Internal Revenue for the First District of New York**

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

PAUL B. BARRINGER, JR.,
Counsel for Petitioner.

Of Counsel,
JOHN G. JACKSON, JR.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of FLORENCE GUGGENHEIM respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an Order for Mandate of that Court entered in this case on April 3, 1940, reversing the decision of the United States District Court for the Eastern District of New York.

Opinions Below

The opinion of the District Court is reported in 28 F. Supp. 322. The opinion of the Circuit Court of Appeals is reported in 110 F. (2d) 371.

Jurisdiction

The order for mandate of the Circuit Court of Appeals reversing the decision of the District Court was entered on April 3, 1940 (R. 200). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended.

Question Presented

The question presented is the value for purposes of the gift tax law of a gift in 1934 of nine single premium life insurance policies. The petitioner contended that the value of the single premium life insurance policies was their cash surrender value on the date of the gift, which is in accord with the Treasury Regulations in effect at the time of the gift. The respondent contended that the value of the gifts was their cost to the petitioner, basing his contention upon the rule of value set forth in the Treasury Regulations adopted in 1936.

Statutes and Regulations Involved

The statutes and the regulations involved will be found in the Appendix, *infra*, pages 7-10.

Statement

The following facts are taken from the stipulation of facts and admitted facts alleged in the complaint.

The petitioner in 1934 took out nine single premium life insurance policies and irrevocably assigned them on the date they were taken out to three of her children by gift. No incidents of ownership were retained by the petitioner. The policies insured the petitioner's life for \$1,000,000. The cost to the petitioner was \$852,438.50, and

the cash surrender value on the date the policies were assigned was \$717,344.81. The petitioner filed a gift tax return listing the policies at their cash surrender value of \$717,344.81, and paid a gift tax thereon.

The Commissioner of Internal Revenue determined that the value of the gifts was the cost of the policies to the petitioner, \$852,438.50, and assessed a tax deficiency of \$13,804.69. The petitioner paid the amount demanded and after denial of claim for refund brought action against the respondent to recover the additional tax paid.

The District Court, in granting the petitioner's motion for judgment on the pleadings, held (R. 175-181) that:

(1) Article 2 (5) of Regulations 79, promulgated on October 30, 1933, interpreted Section 506 of the Revenue Act of 1932 and set forth the rule that the cash surrender value of a single premium life insurance policy is the true measure of value for gift tax purposes.

(2) When Congress re-enacted in 1934 Section 506 of the Revenue Act of 1932, it had knowledge of the foregoing regulation and approved it. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488; *National Lead Co. v. U. S.*, 252 U. S. 140.

(3) Where the Treasury Department has acted for years under an expressed interpretation (Article 2 (5) of Regulations 79—1933 edition) and Congress implicitly has accepted such interpretation through re-enactment of the same statute, a new interpretation (Article 19 (9) of Regulations 79—1936 edition) should not without a showing of Congressional authority have a retroactive effect. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110.

The Circuit Court of Appeals (R. 194-199) reversed the decision of the District Court and held that where a donor takes out a single premium life insurance policy and irrevocably assigns it to another, the value of the gift is the premium paid by the donor.

Specifications of Errors

The Circuit Court of Appeals erred:

1. In holding that the Treasury Regulations in effect in 1934 did not prescribe that cash surrender value be taken as the value of a gift of a single premium life insurance policy.
2. In holding that the value for gift tax purposes of a gift of a single premium life insurance policy is not the cash surrender value of the policy when it is irrevocably assigned.
3. In holding that the value for gift tax purposes of a gift of a single premium life insurance policy is to be measured by the cost of the insurance.

Reasons for Granting the Writ

Section 506 of the Revenue Act of 1932 provides that: "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift". Treasury Regulations 79, Article 2 (5) promulgated October 30, 1933, provides:

"The irrevocable assignment of a life insurance policy, or the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift."

Three Circuit Courts of Appeals have held that Article 2 (5) is a reasonable and consistent interpretation of Section 506 of the Revenue Act of 1932 and that Article 2 (5) provides that the value of a gift in 1934 or 1935 of single premium life insurance policies is the cash surrender value of the policies at the time they were irrevocably as-

signed—*Commissioner v. Haines*, 104 F. (2d) 854, (C. C. A. 3); *Helvering v. Cronin*, 106 F. (2d) 907, (C. C. A. 8) and *Helvering v. Bryan*, 109 F. (2d) 430 (C. C. A. 4). Further, these Circuits Courts held, on the authority of *Helvering v. Reynolds Tobacco Co.*, *supra*, that since Article 2 (5) had the approval of Congress by the re-enactment of Section 506 in the Revenue Acts of 1934 and 1935, Article 2 (5) of the 1933 Treasury Regulations had the force and effect of law, and the 1936 Treasury Regulation (Article 19 (9)) could not be given retroactive effect.

The Second Circuit Court of Appeals in the instant case, in direct conflict with these cases, held:

"There are cases to the effect that cash surrender value governs for purposes of gift tax in the case of gifts of life insurance policies made prior to 1936. *Commissioner v. Haines*, 104 F. (2) 854, (C. C. A. 3); *Helvering v. Cronin*, 106 F. (2) 907, (C. C. A. 8); *Helvering v. Bryan*, decided February 31, 1940, by the Fourth Circuit. These cases rest on an interpretation of former Article 2 (5) to which we cannot accede. There is a decision the other way in the district court, *Ryerson v. United States*, 28 F. Supp. 265 (D. C. Ill.), with which we are in accord."

The case of *Ryerson v. U. S.*, *supra*, is on appeal to the Sixth Circuit Court of Appeals. The Solicitor General has authorized appeals in the case of *Madeleine D. Powers*, Memo. B. T. A. Jan. 9, 1939, to the First Circuit Court of Appeals, and in the case of *Louis Florsheim*, Memo. B. T. A. Sept. 11, 1939, to the Seventh Circuit Court of Appeals. In these cases the same question of valuation for gift tax purposes of single premium life insurance policies is involved.

Conclusion.

The decision of the Second Circuit Court of Appeals in this case is in conflict with decisions of other Circuit Courts of Appeals. This case involves a decision on an important question of Federal gift tax law not decided by this Court. It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL B. BARRINGER, JR.,
Counsel for Petitioner.

Of Counsel,
JOHN G. JACKSON, JR.

APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932, and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. * * * (U. S. C., Title 26, Sec. 551.)

SEC. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. (U. S. C., Title 26, Sec. 555.)

Treasury Regulations 79, pertaining to the Revenue Act of 1932, promulgated October 30, 1933:

ART. 2. *Transfers reached.*—The statute imposes a tax whether the transfer is in trust or otherwise; whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * * In the following examples of transactions resulting in taxable gifts, it will be understood that the transactions occurred after the date of the enactment of the statute (June 6, 1932), and were not for an adequate and full consideration in money or money's worth:

(5) The irrevocable assignment of a life insurance policy, or the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift.

ART. 19. Valuation of property—(1) General—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. . . .

Subdivisions (2) to (8), inclusive, of this article deal, respectively, with the valuation of real estate, stocks and bonds, interest in business; notes, secured and unsecured; intangibles; annuities, life, remainder, and reversionary interests; and tenancies by the entirety.

Treasury Regulations 79, relating to the Revenue Act of 1932, promulgated February 26, 1936:

ART. 2. Transfers reached.—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. . . . In the following examples of transactions resulting in taxable gifts, it will be understood that the transactions occurred after the date of the enactment of the statute (June 6, 1932), and were not for an adequate and full consideration in money or money's worth:

(5) If the insured assigns a life insurance policy, or designates a beneficiary in such a policy, but does not retain what amounts to a power of revocation (as, for example, the right to surrender or cancel the policy, the right to obtain a loan against the policy or its surrender value, or a right to change the beneficiary or assignee, if by the exercise of such latter right the proceeds of the policy might be made

payable to the insured, his estate, or otherwise for his benefit), such assignment or designation constitutes a gift, even though the right of the assignee or beneficiary to receive the proceeds is conditioned upon his surviving the insured. For the valuation of policies of life insurance, see subdivision (9) of article 19.

ART. 19. *Valuation of property.*—(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. . . .

(9) *Life insurance and annuity contracts.*—The value of a life insurance contract or of a contract for the payment of an annuity issued by a company regularly engaged in the selling of contracts of that character is established through the sale of the particular contract by the company, or through the sale by the company of comparable contracts. As valuation through sale of comparable contracts is not readily ascertainable when the gift is of a contract which has been in force for some time and on which further premium payments are to be made, the value may be approximated, unless because of the unusual nature of the contract such approximation is not reasonably close to the full value, by adding to the interpolated terminal reserve at the date of the gift the proportionate part of the gross premium last paid before the date of the gift which covers the period extending beyond that date.

The examples given below, so far as relating to life insurance contracts, are of gifts of such contracts

on which there are no accrued dividends or outstanding indebtedness.

Example: A donor purchases from a life insurance company for the benefit of another a life insurance contract or a contract for the payment of an annuity; the value of the gift is the cost of the contract.

Example: A donor owning a life insurance policy on which no further payments are to be made to the company (e. g., a single premium policy or paid-up policy) makes a gift of the contract. The value of the gift is the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured.

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